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Terrorists and Special Status: The British Experience in Northern Ireland

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I. INTRODUCTION

Northern Ireland has been in a state of civil unrest and emergency rule for nearly twenty years.[1] This tiny state, part of the United Kingdom of Great Britain and Northern Ireland, has been shaken by sectarian strife between bitterly opposed Catholic and Protestant communities,[2] and the re-emergence of the paramilitary Irish Republican Army (IRA).[3] Britain has responded to this situation by enacting legis-

1. *See infra* notes 29-40 and accompanying text.

2. Despite the fact that Northern Ireland is split along sectarian lines, its troubles are not fundamentally religious in nature. Rather, the conflict has deep political, historical, and cultural roots. *See infra* notes 14-18 and accompanying text. Authors often use the term "Republican" and "Loyalist" to denote Northern Ireland's political division. In this context, "Republicans" are Catholics who favor termination of ties with Britain and unification with the Republic of Ireland. Protestant "Loyalists" favor continuing ties with Britain and oppose unification with the heavily Catholic Republic. *See generally* J. DARBY, CONFLICT IN NORTHERN IRELAND: THE DEVELOPMENT OF A POLARIZED COMMUNITY (1976).

3. The IRA is a clandestine quasi-military or terrorist organization recruited from Northern Ireland's Catholic community. The term "IRA" is used to refer to a number of subgroups: the Provisional IRA, the largest group, which engages in violent operations; the Sinn Fein (Gaelic for "Ourselves Alone"), which is the Provisional IRA's political wing; and the Official IRA, which called a ceasefire in 1972 and works separately from the Provisional IRA. *See* REVIEW OF THE OPERATION OF THE NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT 1978, 1984, No. 9222, ¶ 11 (Lord Baker, Chairman) [hereinafter Baker Report]; *see generally* J. BELL, THE SECRET ARMY (1979); T. COOGAN, THE IRA (1970); K. BOYLE, T. HADDEN & P. HILLYARD, TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE 16 (1980) [hereinafter TEN YEARS ON]. The IRA is not the only paramilitary group operating in Northern Ireland, although it is the most notorious. In Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 32 (1978), the European Commission on Human Rights concluded that the threat and reality of terrorism in Northern Ireland comes almost exclusively from the IRA. Other paramilitary organizations, such as the Protestant Ulster Volunteer Force, however, continue to carry on activities there. *See* The Northern Ireland (Emergency Provisions) Act, 1978, sched. 2 [hereinafter 1978 Act] for a list of "proscribed" or outlawed organizations. For further information regarding Protestant paramilitary organizations in Northern Ireland, see generally S. NELSON, ULSTER'S UNCERTAIN DEFENDERS (1984). This Note focuses on the plight of imprisoned members of the IRA, but the same legal analysis applies equally to imprisoned members of these other organizations.

lation that creates extraordinary legal powers in Northern Ireland[4] in derogation of civil liberties guaranteed by the European Convention on Human Rights[5] and the International Covenant on Civil and Political Rights.[6]

Northern Ireland's so-called "emergency acts" have created special legal procedures aimed at perpetrators of "terrorist" or "scheduled" offenses.[7] Since 1972, the legal status of persons jailed under these acts has changed. From 1972 to 1976, IRA prisoners were deemed political offenders and accorded "special status."[8] Beginning in 1976, Britain implemented a criminalization program which downplayed the political motivation of convicted IRA terrorists and eliminated special status.[9] Certain imprisoned IRA members' claims to special status under international law have been considered and rejected by the European Commission on Human Rights.[10] Thus, under existing domestic and

4. The two most recent examples of Britain's so-called "emergency" acts are the 1978 Act, *supra* note 3, and the Prevention of Terrorism (Temporary Provisions) Act, 1984, ch. 8 [hereinafter 1984 Act].

5. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature*, Nov. 4, 1950, 213 U.N.T.S. 221, *reprinted in* 1950 Y.B. ON HUMAN RIGHTS 418 [hereinafter European Convention]. Members of the European Convention are obligated to "secure to everyone within their jurisdiction" the rights guaranteed therein. *Id.* art. 1. The United Kingdom ratified the European Convention in 1951. *See* A. ROBERTSON, HUMAN RIGHTS IN EUROPE 310 (1977). The European Convention, however, allows member nations to derogate from many of the guarantees contained therein "in time of war or other public emergency threatening the life of the nation." European Convention, *supra*, art. 15.

6. International Covenant on Civil and Political Rights, G.A. Res. 2000A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter International Covenant]. The International Covenant contains a derogation provision nearly identical to that found in the European Convention. *Compare* International Covenant, art. 4 *with* European Covenant, art. 15. Art. 41 of the International Covenant provides for state complaint procedures to the UN Human Rights Committee. Art. 41 has come into force relatively recently, however, and the Committee has produced little authority of interest to this Note. In contrast, the European Commission and Court of Human Rights have repeatedly handed down decisions relating to the security situation in Northern Ireland. *See* Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 4, 23 (1981). For these reasons, this Note restricts its discussion of international human rights guarantees in Northern Ireland and derogation therefrom to the European Convention.

7. The provisions of the 1978 and 1984 acts are aimed at those suspected of committing or preparing to commit a "scheduled offence," which are deemed the type of crimes typically committed by members of terrorist organizations. *See* 1978 Act, *supra* note 3, sched. 4; REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. Ser. 5, No. 5185 (Lord Diplock, Chairman) [hereinafter Diplock Report].

8. *See infra* notes 46-51 and accompanying text.

9. *See infra* notes 52-59 and accompanying text.

10. McFeeley v. United Kingdom, 3 E.H.R.R. 161, 1980 Y.B. EUR. CONV. ON HUM. RTS. 256 (Eur. Comm'n on Hum. Rts.).

international law, imprisoned IRA members have no legal claim to special status.

United Kingdom law first accepted and then rejected the notion that the ostensibly political motivation of the terrorists in Northern Ireland created a separate class of criminals.[11] Both Britain and the international community, however, have failed to analyze the question of special status for IRA prisoners from the perspective of the acts of the imprisoning government. This Note argues that the use of extraordinary state powers to imprison those suspected of committing terrorist offenses, in derogation of international human rights guarantees,[12] creates a class of special status prisoner.[13]

This Note first lays a brief historical foundation to aid in understanding the current troubles in Northern Ireland. It then considers the legal status of IRA prisoners under United Kingdom law, and their petition for recognition of special status before the European Commission. Finally, this inquiry shifts to a discussion of Britain's assumption of extraordinary state powers as a means of quelling civil unrest. It concludes with a discussion of Britain's recent re-evaluation of extraordinary powers in Northern Ireland and its obligations under the European Convention.

II. NORTHERN IRELAND

A. Historical Background

A detailed treatment of the historical roots of the hatred and violence which grips Northern Ireland is beyond the scope of this Note,[14]

11. The current attitude is reflected in the Baker Report: "The acceptance of a criminal act for a political end must appear to the ordinary citizen to cut across the avowed policy of criminalisation. Murder is murder." Baker Report, *supra* note 3, ¶ 439.

12. The requirement that such powers be in derogation of international human rights guarantees lends objectivity to the analysis which follows. One can only call state police powers "extraordinary" when measured against certain rights to which the state is bound. Thus, for example, a similar analysis would apply in other nations signatory to the European Convention or the International Covenant. For other nations which do not adhere to an international "Bill of Rights," the following analysis is inapplicable.

13. This Note uses the term "special" rather than "political" status for two reasons. First, this is the term the British themselves applied to IRA prisoners before embarking on their criminalization program. Second, it avoids the emotionally loaded term "political prisoner," which many might argue should not be applied to perpetrators of violent crimes. Thus, this Note analyzes only whether the IRA prisoners should legally be accorded special status, meaning simply a status different from that accorded those who are prosecuted through the ordinary criminal justice system. It does not concern itself with subjective inquiries into the moral or political merits of the IRA's cause, or the violent tactics which they have adopted.

14. The troubles in Ireland have been ongoing for centuries, and have spawned a huge

but a brief summary is appropriate. England first invaded Ireland over 800 years ago, finally conquering it in the 15th century.[15] Polarized along cultural, religious, and political lines, the British and Irish have often resolved their disputes with bloodshed.[16] England solidified its grip on Catholic Ireland through staunchly Loyalist Protestant emigrants, who concentrated in the northern province of Ulster.[17] Ireland was finally incorporated into the United Kingdom in 1800 and ruled directly from London.[18]

War against British rule erupted in Ireland in 1916,[19] which contributed to England's decision to grant Irish home rule in 1920.[20] Ulster's Protestants, however, protested vehemently against separation from London,[21] forcing Parliament to partition Ireland.[22] The Catholic South became the independent Republic of Ireland; six of Ulster's heavily Protestant counties, retained as part of the United Kingdom, became

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volume of literature. The conflict in Northern Ireland in particular has its own substantial body of literature. Indeed, "the most recent bibliography on the Northern Irish conflict contains more than 3,000 references, almost all published since the eruption of community violence in the late 1960's." NORTHERN IRELAND: THE BACKGROUND TO THE CONFLICT 7 (J. Darby ed. 1983) [hereinafter NORTHERN IRELAND BACKGROUND]. Some of the recent works on Ulster include J. DOWNEY, THEM & US: BRITAIN, IRELAND AND THE NORTHERN QUESTION 1969-1982 (1983); P. BUCKLAND, A HISTORY OF NORTHERN IRELAND (1981); F. LONGFORD & A. MCHARDY, ULSTER (1981); A. STEWART, THE NARROW GROUND, ASPECTS OF ULSTER, 1609-1969 (1977); and C. FITZGIBBON, RED HAND: THE ULSTER COLONY (1972).

15. This invasion was dispatched by King Henry II in 1169. England's conquest of Ireland was completed during England's Tudor period. J. DOWNEY, *supra* note 14, at 21-22.

16. "[N]o two nations were more foreign to each other than the Irish and the English .... At once contradicting and emphasizing [their] real and apparent similarities, this foreignness, as well as the intensely close connection of the islands, antedates history .... The political and cultural differences ... have been enormous ever since the Roman conquest of Britain." *Id.* at 20.

17. *See* BUCKLAND, *supra* note 14. The "Plantation of Ulster" began in 1609. By 1703, less than five percent of Ulster's land remained in the hands of the Catholic Irish. J. DARBY, *supra* note 2, at 3.

18. The Union With Ireland Act, 1800, 39 & 40 Geo. 3, ch. 67, *reprinted in* 23 HALSBURY'S STATUTES OF ENGLAND 832 (3d ed. 1970).

19. L. LONGFORD & A. MCHARDY, *supra* note 14, ch. 5.

20. *Id.*

21. P. BUCKLAND, *supra* note 14, at 20.

22. Ulster Protestants had been staunch opponents of home rule for Ireland during the civil war era, preferring that the entire island be ruled directly from Westminster as part of the United Kingdom. Seeing that "the wind was blowing" towards partition and self-government, they settled instead for a solution which would insure a safe Protestant majority. Three heavily Catholic counties within historical Ulster were left on the Republic side of the new border, leaving a Protestant majority in the new six county Northern Ireland. *Id.* at 19-20. The other 32 counties comprising the Republic of Ireland are still, as they have always been, overwhelmingly Catholic. *See* J. DARBY, *supra* note 2.

Northern Ireland.[23] A separate Northern Irish parliament was created at Stormont, subject to supreme authority in London.[24]

Partition left Northern Ireland bitterly divided. The Loyalist majority has wielded its political power[25] to secure its position and continued ties with Britain.[26] The Catholic minority, subjected to systematic discrimination in areas such as employment, housing, and voting rights,[27] has been dissatisfied with its treatment under Protestant majority rule and manifests typical Irish antipathy towards the English.[28]

B. The Civil Rights Movement and the IRA

Catholic frustration over their second-class status led to a widespread civil rights movement in 1968.[29] As demands for reform remained unheeded, tensions mounted between Catholic and Protestant

23. The Government of Ireland Act, 1920, 10 & 11 Geo. 5, ch. 67, *reprinted in* 23 HALSBURY'S STATUTES OF ENGLAND 843 (3d ed. 1970) [hereinafter 1920 Act]. Six of Ulster's nine counties became the new country of Northern Ireland. *Id.* § 1(2). The Republic became officially "free" with the Irish Free State (Consequential Provisions) Act, 1922, 13 Geo. 5, ch. 2, *reprinted in* 23 HALSBURY'S STATUTES OF ENGLAND 901 (3d ed. 1970).

24. The legal relationship between Northern Ireland and Great Britain was set forth in the 1920 Act, which reads in part: "Notwithstanding the establishment of the Parliament of Northern Ireland . . . the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters, and things [in Northern Ireland]." 1920 Act, *supra* note 23, ch. 67.

25. The Protestant majority has dominated the Northern Irish Parliament through the Unionist Party. J. DARBY, *supra* note 2, ch. IV.

26. *Id.*

27. *See* DISTURBANCES IN NORTHERN IRELAND: REPORT OF THE COMMISSION APPOINTED BY THE GOVERNOR OF NORTHERN IRELAND, 1969, No. 532 (Lord Cameron, Chairman) [hereinafter Cameron Report]. Systematic Protestant discrimination against the Catholic Irish has not been limited to Northern Ireland or the twentieth century. The policy of comprehensive colonization of Ulster with loyal Protestants under James I was coupled with a legal regime which reduced Catholics "to a state below servility." In the 1690s, an exclusively Protestant Irish Parliament passed a series of "Penal Laws," which, *inter alia*, excluded Catholics from the legal profession and from parliament, banished their bishops and clergy, and forbade them from holding long leases on land, buying land from a Protestant, and conducting schools. J. DARBY, *supra* note 2, at 3-4.

28. *See* Cameron Report, *supra* note 27, at ¶ 130; J. DARBY, *supra* note 2, at 48-79.

29. In 1969, the Governor of Northern Ireland formed a Commission under Lord Cameron to study the civil rights movement and the outbreak of violence. The Cameron Report concluded that the civil rights movement was caused by: a rising sense of injustice among the Catholic population regarding housing practices; complaints of discrimination in Unionist (i.e. Protestant) controlled authorities; complaints of gerrymandering to deny Catholics influence in local government in proportion to their numbers; resentment over the government's failure to investigate complaints or provide a remedy for them; resentment over existence of the exclusively Protestant "B Special" paramilitary police force; and resentment over the continuation of the 1922 Special Powers Act and the regulation made thereunder. Cameron Report, *supra* note 27, at 140-145.

communities until rioting erupted.[30] Stormont proved unable to stem the rising tide of violence and anarchy, and in 1969, British Army auxiliary units were called in to assume routine police functions.[31] Finally, in March 1972 Northern Ireland's parliament was dissolved and direct rule from London was reinstated.[32] To date the violence continues, albeit at a lesser rate than in the initial years of the civil rights movement,[33] and Northern Irish self-rule has not been restored.[34]

The IRA, which has operated off and on throughout the twentieth century in Ireland, reemerged in 1969.[35] The European Court of Human Rights has described the IRA as a clandestine quasi-military organization which accepts neither the existence of Northern Ireland as part of the United Kingdom, nor recognizes the democratic order of the Republic.[36] The IRA reorganized ostensibly to provide armed protection for Catholic communities besieged by Protestant mobs.[37] IRA activities,

30. *Id.* at pp. 50-52.

31. LONDON SUNDAY TIMES INSIGHT TEAM, NORTHERN IRELAND: A REPORT ON THE CONFLICT 113-25 (1972) [hereinafter LSTIT].

32. P. BUCKLAND, *supra* note 14, at 157.

33. In the 16 years prior to 1985, 2400 people have died from acts of political violence and 25,000 others have been wounded. Getler, *IRA's New High Stakes' Strategy More Deadly*, San Francisco Chron., Nov. 14, 1984, at A2, col. 1. *See* Spjut, *Criminal Statistics and Statistics on Security in Northern Ireland*, 23 BRIT. J. CRIMINOLOGY 358, 361 (1983), which calculates 2062 deaths due to political violence from 1969 to 1980. The level of violence, however, has not been constant from year to year. Spjut calculates that the number of unlawful killings and other deaths connected with the security situation in Northern Ireland dropped from a high of 468 in 1972 to 76 in 1980. *Id.* at 361, table 2.

34. In 1985, Britain and the Republic of Ireland signed an agreement giving the latter a formal role in the government of Northern Ireland for the first time. Art. II of the agreement creates an Anglo-Irish Intergovernmental Council to deal with political matters, security, legal matters (including the administration of justice), and the promotion of cross-border cooperation. N.Y. Times, Nov. 16, 1985, at 1, col. 1.

35. *See supra* note 3. The IRA has its roots in the guerilla army which fought the British in the Anglo-Irish war in 1919 and 1920. J. BELL, *supra* note 3, ch. 1. The IRA has undergone cycles of relative activity and inactivity in every subsequent decade. *Id.* Prior to 1969, outbreaks of IRA violence occurred in 1954 and 1956, which included armed attacks on Northern Irish police barracks. Lawless v. Ireland (No. 3), 3 Eur. Ct. H.R. (ser. A) (1960). The IRA reactivated on Easter of 1969 at the time the civil rights movement erupted. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 28 (1978).

36. *Ireland*, 25 Eur. Ct. H.R. (ser. A) ¶ 6.

37. Catholic civil rights marchers operated peacefully in 1968 and 1969 until they were attacked by armed and organized Protestant paramilitary groups. Cameron Report, *supra* note 27, ¶¶ 216-226. Further Protestant reaction to the civil rights movement prompted waves of rioting, which focused on Catholic enclaves in Belfast and Derry. Stormont was unable or unwilling to protect Catholic communities from Protestant extremists who were destroying Catholic homes. As a result, the IRA, which had few members in mid-1969, gained increasing support and turned to the defense of Catholic ghettos. LSTIT, *supra* note 31, at 134. The Catholic community united temporarily behind the IRA, as heavy-handed tactics by the British Army, including the Bloody Sunday massacre, provided a flood of IRA recruits. White,

however, soon expanded to include attacks on British troops and the Royal Ulster Constabulary (RUC), Northern Ireland's largely Protestant police force.[38] The IRA has also engaged in bombings and executions.[39]

By 1971, widespread civil unrest and the campaign of violence conducted by the IRA had reached unprecedented proportions.[40] Stormont became concerned that normal criminal procedures were inadequate to control the IRA, widespread IRA intimidation often made it impossible to obtain sufficient evidence to secure a criminal conviction against a known IRA member, and IRA members escaped too easily across the border between Northern Ireland and the Republic.[41] In August 1971, Stormont resurrected its power under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922[42] to order "internment" (executive detention without charge or trial) of suspected IRA members.[43] Following

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From Conflict to Violence: The Re-emergence of the IRA and the Loyalist Response, in NORTHERN IRELAND BACKGROUND, *supra* note 14, at 16. The IRA established "no-go" zones in which even British troops could not easily move. In these zones, the IRA acted as a police and defense force. *Id.*; LSTIT, *supra* note 31, at 250.

38. The RUC is recruited largely from the Protestant community, and is military in outlook and training. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 HUM. RTS. 261, 264 (1976). Shooting at the security forces' patrols increased, and in 1971, for the first time, soldiers numbered among the casualties. *Ireland*, 25 Eur. Ct. H.R. (ser. A) ¶ 32. The outmanned IRA adopted guerilla hit-and-run tactics against the numerically superior security forces. J. DOWNEY, *supra* note 14, at 194.

39. The IRA began bombing public places and carrying out sectarian reprisals against Protestant extremists and members of the security forces. Between January and July 1971, police statistics recorded a total of 304 explosions, including 94 for the month of July. *Ireland*, 25 Eur. Ct. H.R. (ser. A) ¶ 32. In February 1972, the IRA extended its bombing campaign to England, where it was responsible for 86 bombings and shooting incidents in 1973. McVeigh, O'Neill & Evans v. United Kingdom, Application Nos. 8022/77, 8025/77, 8027/77 (1981) (Eur. Comm'n on Hum. Rts.) ¶ 21. The IRA still grabs headlines with bombing attacks in England, such as the 1983 Christmas bombing at Harrod's department store in London, The Sunday Times (London), Dec. 18, 1983, at 1, col. 1, and the nearly successful attempt on Margaret Thatcher's life in 1984, San Francisco Chron., Oct. 13, 1984, at 1, col. 5.

40. By 1971, certain parts of Northern Ireland were in a state of "urban guerilla warfare." LSTIT, *supra* note 31, at 281. The number of explosions had jumped from eight in 1969 to 155 in 1970. *Ireland*, 25 Eur. Ct. H.R. (ser. A.) ¶ 29. From August 1971 through March 1972, there were 1130 bomb explosions and well over 2000 shooting incidents in Northern Ireland. *Id.* ¶ 48.

41. *Id.* ¶ 36.

42. The Civil Authorities (Special Powers) Act (Northern Ireland), 1922, 12 & 13 Geo. 5, ch. 5 [hereinafter 1922 Act].

43. The 1922 Act granted the Northern Irish Minister for Home Affairs the power to enact such regulations "as may be necessary for preserving the peace and maintaining order." *Id.* § 1. Regulation 11 of the 1922 Act provided that:

> (1) Any person authorised for the purpose by the Civil Authority . . . may arrest without warrant any person whom he suspects of acting or of having acted or of being about to act in a manner prejudicial to the preservation of the peace or maintenance of order . . . .

Stormont's dissolution, Britain nullified the 1922 Act and replaced it with its own emergency powers legislation.[44]

III. SPECIAL STATUS UNDER UNITED KINGDOM LAW

A. Special Category Status

IRA members caught in the internment sweeps were not treated like ordinary criminals. When internment was reintroduced in 1971, detainees were housed in hutted compounds and permitted to organize themselves like prisoners of war.[45] When the British reasserted direct control over Northern Ireland, they adopted policies which recognized the political nature of terrorist offenses in two ways. First, in June 1972 they introduced a policy of "special category status" for those detained or convicted under emergency powers.[46] Under this policy, any convicted criminal sentenced to more than nine months imprisonment who claimed political motivation and was accepted by a compound leader was accorded special status.[47] In practice, special status prisoners were allowed to wear their own clothes, were exempted from work, were allowed food parcels, could receive more frequent visitors, could spend their own money in the prison canteen, and were segregated into compounds according to the paramilitary organization to which they claimed

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(2) Any person so arrested may, on the order of the Civil Authority, be detained either in any of Her Majesty's prisons or elsewhere, as may be specified in the order, upon such conditions as the Civil Authority may direct, until he has been discharged by direction of the Attorney General or is brought before a Court of Summary Jurisdiction.

Id.

The internment power was introduced in Ireland in 1916 during the "Easter Rising," an armed rebellion against British rule. At that time over 1800 people were interned without charge or trial. Lowry, *supra* note 38, at 268. Stormont was sharply criticized for resurrecting on a larger scale than ever before "the power most offensive to international opinion." LSTIT, *supra* note 31, at 300-01.

44. Northern Ireland (Emergency Provisions) Act, 1973, ch. 53, *reprinted in* 43 HALSBURY'S STATUTES OF ENGLAND 1235 (3d ed. 1970) [hereinafter 1973 Act].

45. TEN YEARS ON, *supra* note 3, at 88. These prisoners were housed in hutted compounds in specially prepared facilities, such as at Long Kesh and Magilligan. With the abolition of special category status, the compounds at Long Kesh were gradually replaced with 800 H-shaped prison buildings ("H Blocks") and the facility was renamed H.M. Maze Prison. *Id.* at 88-89. The H Blocks have been the scene of several IRA hunger strikes, the most infamous of which resulted in the deaths of imprisoned IRA member and Member of Parliament Bobby Sands and nine other strikers. *See* J. FEEHAN, BOBBY SANDS AND THE TRAGEDY OF NORTHERN IRELAND (1983).

46. REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISTS IN NORTHERN IRELAND, No. 5847 (1975) (Lord Gardiner, Chairman) ¶ 105 [hereinafter Gardiner Report].

47. *Id.*

allegiance.[48]

The special status system afforded IRA members a great deal of autonomy. Each compound had a commanding officer who organized the detainees' daily routine and gave his charges whatever military and political training he thought appropriate. Prison officials did not enter the compounds except for regular headcounts and occasional searches for weapons. Under these circumstances, special status looked like a recognition by British authorities of some form of political status for terrorist offenders.[49]

Second, British emergency legislation itself distinguished terrorism from ordinary offenses. Special police and judicial powers under the emergency acts are available only to combat "terrorist" offenders and not ordinary criminals.[50] The word "terrorism" throughout this legislation refers to "the use of violence *for political ends* and includes any use of violence for the purpose of putting the public or any section of the public in fear."[51]

B. Criminalization

In 1975, the British government embarked on a campaign to deny the political dimensions of the conflict in Northern Ireland and recast the problem in terms of security, law, and order.[52] The special status policy was an obvious target for this new program. A British government-appointed committee, headed by Lord Gardiner, reported that accomodation of prisoners in special compounds was thoroughly unsatisfactory and criticized the special status program for lending legitimacy to terrorist activities.[53] The Gardiner Report recommended elimination of spe-

48. *Id.*

49. TEN YEARS ON, *supra* note 3, at 89.

50. 1973 Act, *supra* note 44, sched. 4.

51. *Id.* § 28(1) (emphasis added). The same definition is contained in § 31(1) of the 1978 Act. The Baker Report roundly criticized the retention of a definition of terrorism as a political offense. It acknowledged the inconsistency in downplaying the political motivation of terrorist violence through Britain's criminalization policy and maintaining a definition of terrorism as "the use of violence for political ends." Baker stated that the emphasis should be "on the crime and not the motive of the criminal" in order to divorce the act of terrorism from its political ends. Baker Report, *supra* note 3, ¶ 441. Accordingly, Baker recommended that the 1978 Act be amended to abandon the "political ends" language in the definition of terrorism and that another definition be adopted which emphasizes terrorists' use of fear and coercion. *Id.* ¶ 440.

52. P. HILLYARD, *Law and Order*, in NORTHERN IRELAND BACKGROUND *supra* note 14, at 43.

53. Gardiner Report, *supra* note 46, ¶¶ 105-110. Gardiner argued that special category prisoners were more likely to emerge with an increased commitment to terrorism, special status reduced the deterrent effect of the sentences, and there was no justification for granting

cial status for prisoners claiming political motivation:

> [W]e have come to the conclusion that the introduction of special category status was a serious mistake . . . . We can see no justification for granting privileges to a large number of criminals convicted of very serious crimes, in many cases murder, merely because they claim political motivation. It supports their own view, which society must reject, that their political motivation in some way justifies their crimes.[54]

Accordingly, the British government implemented a new policy of "criminalization" of terrorist offenses.[55] It announced that no prisoners sentenced for crimes committed after February 1976 would be granted special category status.[56] In March 1980, this policy was extended to prisoners charged after April 1, 1980 for crimes whenever committed.[57] There are still a small number of special category prisoners not affected by these changes, most of whom are serving life sentences.[58] IRA prisoners have continued to press their right to special status, which has caused a number of conflicts with prison authorities.[59]

IV. POLITICAL VIOLENCE AND SPECIAL STATUS UNDER INTERNATIONAL LAW

IRA prisoners' claims to special status derive no support from international law. The European Commission on Human Rights (European

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privileges to persons convicted of serious crimes because they claim political motivation. *Id.* ¶¶ 106-108.

54. *Id.* ¶ 107.

55. "Criminalization" was a wide-ranging program which eliminated special category status and emphasized use of the police and courts rather than arrest by the military and executive detention.

56. Baker Report, *supra* note 3, ¶ 451.

57. *Id.*

58. *Id.*

59. As special category status was phased out, IRA prisoners were required to serve their sentences according to an ordinary prison regime. Many of the prisoners refused to accept prison clothing and were left with nothing but a blanket to wear in their cells. McFeeley v. United Kingdom, 3 E.H.R.R. 161, 164, 1980 Y.B. EUR. CONV. ON HUM. RTS. 256 (Eur. Comm'n on Hum. Rts.).

In 1978, having failed to gain concessions from prison authorities, IRA prisoners began a "dirty protest," foregoing use of washing facilities and smearing cell walls with their own excreta. This protest was followed by an abortive hunger strike launched on Oct. 27, 1980. The strike was called off when one of the prisoners neared death, because the IRA believed important concessions from authorities were forthcoming. These concessions proved unsatisfactory. On March 1, 1981, Bobby Sands initiated a second hunger strike. He died on May 5, 66 days later. Nine others died with him before the strike was ended on Oct. 5, 1981. Sands' death was all the more spectacular because he had been elected as a Member of Parliament while in prison and during the hunger strike. J. DOWNEY, *supra* note 14, at 195-96; P. HILLYARD, *supra* note 52, at 53-55. *See also* J. FEEHAN, *supra* note 45.

Commission),[60] in *McFeeley v. United Kingdom*,[61] heard and rejected a claim by certain IRA prisoners that they were entitled to special status under the European Convention. Moreover, no support for special status for terrorist offenders is found in Common Article Three,[62] Protocol I,[63] or Protocol II[64] to the 1949 Geneva Conventions, or in the European Convention on the Suppression of Terrorism.[65]

60. The European Commission is a body created under the European Convention on Human Rights, a product of the Council of Europe. The Council of Europe consists of eighteen member states, all of whom have ratified the Convention: Austria, Belgium, Cyprus, Denmark, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Sweden, Switzerland, Turkey, and the United Kingdom. F. JACOBS, THE EUROPEAN CONVENTION IN HUMAN RIGHTS 2 n.1 (1975). It was founded in 1949 by the Western democracies to secure respect for fundamental rights and freedoms, and provide a mechanism for their enforcement. One of its first accomplishments was the promulgation of the European Convention, which was modeled in part after the Universal Declaration of Human Rights adopted by the U.N. General Assembly in 1948. *See generally id.*; A. ROBERTSON, *supra* note 5; F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1974).

The Convention created the European Commission and the European Court of Human Rights to hear petitions and adjudicate claims. European Convention, *supra* note 5, art. 19. The Commission is unique in that it may accept claims not only from member states, *id.* art. 24, but from any person or non-governmental organization claiming a violation by one of the member states. *Id.* art. 25. The Commission is only competent to deal with matters after all domestic remedies have been exhausted. *Id.* art. 26. The Commission must reject any petition which is anonymous, substantially the same as a matter it has already examined, or incompatible with the provisions of the Convention. *Id.* art. 27. If the Commission accepts a petition, it tries to effectuate a friendly settlement between the parties. *Id.* art. 30. If a solution is not reached, the Commission draws up a report on the facts and states its opinion on whether a country has breached its obligations under the Convention. *Id.* art. 31.

The European Convention also created the European Court of Human Rights, which serves a limited appellate function. Only after the Commission has considered an application and acknowledged the failure of friendly efforts to settle the issue can the Court hear an appeal. *Id.* art. 47. Only the Commission or a member state, and not an individual petitioner, may bring an appeal before the Court. *Id.* art. 44. The judgment of the Court is final, *id.* art. 52, and member states are bound by such decision. *Id.* art. 53.

61. McFeeley v. United Kingdom, 3 E.H.R.R. 161, 1980 Y.B. EUR. CONV. ON HUM. RTS. 256 (Eur. Comm'n on Hum. Rts.).

62. Common Article Three to the Geneva Conventions of 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Common Article Three].

63. Protocol Additional to the Geneva Conventions of 1949 (Protocol I), *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter PROTOCOL I].

64. Protocol Additional to the Geneva Conventions of 1949 (Protocol II), *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

65. European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977, *reprinted in* 15 I.L.M. 1272 (1976).

A. *McFeeley v. United Kingdom*

The elimination of special category status precipitated an escalating war of nerves between IRA prisoners, who went on a "dirty protest"[66] to force the status reestablishment, and prison officials, who imposed disciplinary punishments. By 1978, the prisoners felt that they had been subjected to a panoply of practices in violation of the European Convention on Human Rights. Having exhausted all potential domestic remedies, four IRA prisoners applied to have their case adjudicated by the European Commission in *McFeeley v. United Kingdom*.[67]

Among other charges,[68] the prisoners' petition alleged that the European Convention guaranteed them the right to special status as "political prisoners" or "prisoners of war."[69] The petitioners argued that Article 9(1) of the Convention guaranteed them the right to special status. Article 9(1) reads: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes . . . freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."[70]

The prisoners argued that they were required to wear prison uniforms and engage in prison work contrary to their "beliefs." Because of the political nature of their acts, they argued, they "should not be subjected to the same prison regime as other prisoners convicted of 'ordinary' criminal offences."[71] The British government responded that " 'belief' in article 9(1) relates to the holding of spiritual or philosophical convictions which have an identifiable formal content," and does not include opinions or political convictions.[72]

Without explanation, the Commission decided that the right to spe-

66. *See supra* note 59.

67. McFeeley v. United Kingdom, 3 E.H.R.R. 161, 1980 Y.B. EUR. CONV. ON HUM. RTS. 256 (Eur. Comm'n on Hum. Rts.).

68. The IRA prisoners charged British authorities with a number of practices in contravention of the European Convention, including: unfair loss of remissions, earnings, and other privileges; confinement with another prisoner in a one-man cell on a permanent basis; denial of adequate washing facilities, causing inadequate personal hygiene and filthy cells; denial of clothing and footwear other than prison clothing; being forced to eat cold food from the floor; inadequate medical services; denial of proper toilet facilities; use of close body and strip searches; denial of all exercise privileges; severely restricted diet; collective punishment, including removal of furniture and religious literature; excessive use of isolation and solitary confinement without adjudication; interference with religious practices; and refusal to subject protesting female prisoners to similar harsh treatment. McFeeley v. United Kingdom, 3 E.H.R.R. at 165-82.

69. *Id.* at 191.

70. European Convention, *supra* note 5, art. 9(1).

71. *McFeeley*, 3 E.H.R.R. at 161.

72. *Id.*

cial status for certain categories of prisoners was not "among the rights guaranteed by the Convention or Article 9 in particular."[73] It also held that the freedom to manifest religion or belief in practice under Article 9(1) did not include a right for the petitioners to wear their own clothes in prison.[74] Finally, in a point not argued by any of the parties, the Commission observed that the petitioners' claim to special status as political prisoners could not be derived from existing norms of international law, again without explanation.[75]

B. Other International Law

The *McFeeley* Commission failed to disclose which documents it considered in concluding that the prisoners' claims to special status had no support under international law. However, it probably considered, or should have considered, Common Article Three, Protocol I, and Protocol II to the 1949 Geneva Conventions, and the European Convention on the Suppression of Terrorism.[76]

Common Article Three and Protocol II govern the international law of civil war. The IRA could plausibly be considered a rebel force operating in a civil war in Northern Ireland, and its imprisoned members could be considered captured combatants. A discussion of both documents therefore illuminates their treatment of special status for "captured combatants."

1. Common Article Three

Common Article Three sets forth certain humanitarian standards for the conduct of civil war, including the treatment of rebel combatants.[77] It applies to "armed conflict not of an international

73. *Id.*
74. *Id.*
75. *Id.* ¶ 43.
76. *See* TEN YEARS ON, *supra* note 3, at 93-95.
77. Common Article Three states:

> In the case of armed conflict not of an international character occurring in the territory of one the the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-named persons:

character,"[78] yet these terms are not defined. Commentators argue that Article Three applies automatically to situations of "non-international armed conflict,"[79] whatever that may be, and that its provisions apply not only to member states but to rebel "parties" as well.[80]

The United Kingdom is a signatory to Common Article Three.[81] Whether Common Article Three applies to the conflict in Northern Ireland, however, is problematic because there is no criteria for determining what constitutes an "armed conflict."[82] The United Kingdom has denied that Northern Ireland is in a state of armed conflict and that Article Three should be applied.[83] If Article Three applies automatically to re-

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(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties of the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Common Article Three, *supra* note 62.

78. *Id.* at 1.

79. *See* Junod, *Additional Protocol II: History and Scope*, 33 AM. U.L. REV. 29, 30 (1983).

80. The first paragraph says that "*each* Party to the conflict" is bound to apply the standards laid forth in the article [emphasis added]. On its face, this confers "Party" status to organized rebel groups. One author argues in this context that "the judicial basis for imposing legal obligations on persons or bodies other than governments is questionable," but observes that a government arguably ratifies a convention on behalf of all its citizens, including rebels. Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 AM. U.L. REV. 9, 12 (1983). For an argument that insurgents are parties, see R. HULL, THE IRISH TRIANGLE: CONFLICT IN NORTHERN IRELAND 166-68 (1976). The "each Party" language became a bone of contention during the drafting stages of Protocol II, for few nations wished to confer any recognition upon rebels. *See infra* notes 88-90 and accompanying text.

81. *See* Common Article Three, *supra* note 62.

82. There is a genuine problem of interpretation because every use of arms in defiance of a government could scarcely be said to give rise to an armed conflict making article 3 applicable. The article itself attempts no definition in terms of levels of force or of rebel control of territory that might assist in resolving the problem.

Lysaght, *supra* note 80, at 14; *see also* R. HULL, *supra* note 80, at 165-66.

83. Solf, *Non-International Armed Conflicts*, 31 AM. U.L. REV. 927, 931 n.10 (1982).

bel parties as well as to member states, however, such denials are not legally relevant.[84]

Common Article Three contains no provisions granting captured combatants amnesty for their actions or the right to be treated differently than prisoners convicted in ordinary courts. Moreover, the last paragraph in the Article states that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict."[85] Thus, even if Common Article Three does apply to Northern Ireland, it does not confer special status on IRA prisoners.

2. Protocol II

International regulation of non-international armed conflict was clarified and expanded in 1977 with the promulgation of Protocol II to the 1949 Geneva Conventions.[86] Protocol II avoided the vagueness problems of Common Article Three by establishing criterion for its application.[87] There were hopes among the drafters of Protocol II that pris-

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84. *See supra* note 80.

85. Common Article Three, *supra* note 62.

86. *See supra* note 64. Only 16 nations have ratified Protocol II: Bahamas, Bangladesh, Botswana, Ecuador, El Salvador, Finland, Gabon, Ghana, Libya, Jordan, Laos, Mauritania, Niger, Sweden, Tunisia, and Yugoslavia. M. BOTHE, K. PARTSCH, & W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 725 (1982) [hereinafter BOTHE, COMMENTARY].

87. Art. 1(1) of Protocol II "develops and supplements" Common Article Three by setting forth criterion for Protocol II's application. Specifically, it applies to all armed conflicts:

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Protocol II, *supra* note 64.

In the debates on Art. 1, drafting nations expressed concern that a widely applied Protocol II would encourage foreign interventions and endanger the sovereignty of states and their competence to deal with internal matters. Accordingly, the nations deliberately set forth the above criterion to create a high threshold of application. BOTHE, COMMENTARY, *supra* note 86, at 625-26. For a discussion of the application of the criterion set forth above, see Junod, *supra* note 79, at 36-39; Solf, *supra* note 83, at 929; Bothe, *Article 3 and Protocol II: Case Studies of Nigeria and El Salvador*, 31 AM. U.L. REV. 899, 906 (1982); BOTHE, COMMENTARY, *supra* note 86, at 625-27.

Commentators disagree on how the Art. 1 threshold is met. Bothe states that the qualifications required in Art. 1 are objective, and the High Contracting Party has no discretion to decide whether Protocol II applies on its territory. BOTHE, COMMENTARY, *supra* note 86, at 628. Solf takes the opposite view, maintaining that only the government involved can make such a determination, unless the issue could be litigated in the International Court of Justice with the consent of the parties concerned. Solf, *supra* note 83, at 932.

oner-of-war status would be conferred on imprisoned combatants.[88] Both Western and Third World nations, however, were reluctant to confer this kind of legitimacy on participants in armed rebellion.[89] Accordingly, any language conferring "party" status on rebel forces or special status for rebel prisoners was excised from the final draft.[90]

The United Kingdom is a signatory but not an adherent to Protocol II.[91] Even if it were an adherent, it is unclear whether the IRA can meet the Article 1 criterion of being an "organized arm group."[92] Thus, as with Common Article Three, even if article 1 applied in Northern Ireland, it would not confer special status on IRA prisoners.

3. Protocol I

Protocol I supplements the humanitarian guarantees contained in the Geneva Conventions on international armed conflict. By definition, international armed conflicts under Protocol I include those "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[93] Under Protocol I, "armed forces" are all armed groups under a command responsible for the conduct of its subordinates, and a member

88. Lysaght, *supra* note 80, at 21.

89. Antipathy toward international regulation defining purely domestic matters clouded the discussions. The Western states were willing to accord international standing to liberation movements for humanitarian purposes, but were opposed to setting a precedent for the participation of such movements in other matters and for granting them international standing of general scope. BOTHE, COMMENTARY, *supra* note 86, at 8-9. For their part, Third World states were reluctant to confer any international recognition upon armed dissidents for fear of undermining their own stability, even at the sacrifice of better protection for the victims of non-international armed conflict. *Id.* A number of developing countries expressed concern that Protocol II constituted an encouragement of rebellion in newly independent countries. *Id.* at 669.

90. Junod, *supra* note 79, at 33; Cassese, *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30 INT'L & COMP. L.Q. 416, 421 (1981). Bothe notes that: "Protocol II does not confer *a special status* on members of the armed forces of either side captured by the adverse party similar to the status of a prisoner of war in an international armed conflict. The rebel does not enjoy any privilege with regard to acts committed during the rebellion." BOTHE, COMMENTARY, *supra* note 86, at 646 (emphasis added).

91. BOTHE, COMMENTARY, *supra* note 86, at 725.

92. Lysaght ventures an opinion that the IRA would indeed fail to meet the Art. 1 criterion:

> The failure of terrorist groups [in Northern Ireland] to observe any of the laws of warfare contained in Protocol II and the fact that they never really controlled any territory or carried on concerted military operations could be cited . . . to aid in resisting [a claim of amnesty for persons participating in armed conflict at the end of hostilities].

Lysaght, *supra* note 80, at 24.

93. Protocol I, *supra* note 63, art. 1(4).

of such a force is a "combatant."[94] Combatants who distinguish themselves from the civilian population while they are engaged in military operations by carrying their arms openly are "prisoners of war" upon capture by the adverse party.[95]

It is possible that the IRA could meet the definition of "armed force," as it has an organized command structure responsible for the conduct of its subordinates.[96] The IRA undoubtedly views its campaign as a fight against colonial domination and alien occupation against the British, even though the majority in Northern Ireland has exercised its right of self-determination in favor of links with Britain. The IRA is also a covert organization which does not always distinguish itself from the civilian population while carrying on an operation. Thus, IRA members probably would not qualify as "combatants" under Protocol I and would derive no special status therefrom as prisoners.

a. *European Convention on the Suppression of Terrorism*

The *McFeeley* Commission also could have considered whether international extradition law grants IRA members special status as perpetrators of political offenses. Many international extradition treaties contain a "political offense" exception, by which the individual may apply for political asylum and be immune from extradition when he is charged with a political crime.[97]

The European Convention on the Suppression of Terrorism, however, removes terrorists from the political offense exception.[98] The Convention provides that certain offenses will not be regarded as political offenses for the purposes of extradition.[99] These offenses include kidnapping and the use of bombs or automatic firearms, which are some of the IRA trademarks. IRA members who flee to the Republic of Ireland formerly relied on political offense exceptions to avoid extradition to the United Kingdom.[100] Under the Convention on the Suppression of Terrorism, IRA members are no longer considered political offenders, and therefore enjoy no special status as prisoners.

94. *Id.* art. 43.

95. *Id.* art. 44.

96. *See* J. BELL, *supra* note 3.

97. *See* Carbonneau, *Terrorist Acts—Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases*, 3 HASTINGS INT'L & COMP. L. REV. 265 (1980).

98. European Convention on the Suppression of Terrorism, *supra* note 65, preamble.

99. *Id.* art. I.

100. TEN YEARS ON, *supra* note 3, at 95.

V. THE BRITISH RESPONSE TO CIVIL UNREST AND TERRORISM

Civil unrest and paramilitary attacks by the IRA have hampered British control over Northern Ireland since the state's inception.[101] Britain has responded to what it perceives as a security problem by establishing "temporary" or "emergency" state powers, which have lasted over 60 years.[102] These special acts provide for sweeping powers of arrest, search and seizure, trial without jury for terrorist offenders, and expedited procurement and admission of confessions.[103] The United Kingdom has notified the Council of Europe of the public emergency in Northern Ireland and the exercise of special powers in derogation of rights guaranteed in the European Convention.[104] This Note argues that Britain's use of special powers in Northern Ireland, in derogation of binding human rights guarantees, creates a class of special status prisoner, notwithstanding domestic and international law.[105]

A. The European Convention and Article 15

The United Kingdom has no constitution which guarantees the rights of the individual against the power of the state. The word of Parliament is supreme and cannot be overturned by British courts.[106] The United Kingdom, however, is a signatory to the European Convention,[107] which guarantees the rights of individual citizens of member nations.[108] Articles 5 and 6 of the Convention set forth minimum guarantees for the arrest and trial of criminal suspects.[109]

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101. *See supra* notes 25-44 and accompanying text.

102. Baker noted that Ireland has a long history of emergency legislation and special powers going back over two centuries to the Whiteboy Act of 1775. Baker Report, *supra* note 3, ¶ 15. The first special powers act in Northern Ireland was the 1922 Act, *supra* note 42.

103. *See infra* notes 120-73 and accompanying text.

104. *See generally supra* note 60 and accompanying text.

105. The Diplock Report itself supports this thesis to the extent it acknowledges that terrorist offenders, unlike "ordinary" criminals, were not subject to "ordinary" judicial powers. Diplock states that:

> [I]f decisions as to guilt are to be made by tribunals, however independent or impartial, which are compelled by the emergency to use procedures which do not comply with [the European Convention], we do not think that a tribunal which fulfills this function should be regarded or described as an ordinary court of law or as forming part of the regular judicial system or should be composed of judges who also sit in the regular criminal courts in Northern Ireland.

Diplock Report, *supra* note 7, ¶ 12.

106. 34 HALSBURY'S LAWS OF ENGLAND § 1003 (4th ed. 1980).

107. *See supra* note 60.

108. European Convention, *supra* note 5, art. 1.

109. *Id.* art. 5 and art. 6.

The question of derogation from the Convention's provisions in time of public emergency arose during the Council of Europe's initial debates. The two conflicting viewpoints were voiced by Irish and British delegates. An Irish delegate "stressed the need to protect minorities from deprivations of liberty such as occurred under the Special Powers Act in Northern Ireland." The British delegate responded that "in times of emergency the safety of the community is of the first concern."[110] The British view prevailed. The derogation provision, included in Article 15, incorporated the principle of necessity, so that states would be free to take measures in a state of emergency which would otherwise be unlawful.[111]

Article 15 states in part:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[112]

Article 15 also provides that certain provisions of the Convention are "non-derogable" even in times of emergency,[113] and that any state availing itself of its derogation right must inform the Council of Europe of the state's reasons and the measures taken.[114] To successfully justify an act in contravention of the Convention's guarantees, a state must show that: (1) a "public emergency" existed at the material time; (2) the measures taken were in fact strictly required by the exigencies of the situation; and (3) such measures were consistent with other obligations under interna-

110. *See* 1 COLLECTED EDITION OF THE TRAVAUX PREPARATOIRES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 104 (Council of Europe 1975); Hartman, *supra* note 6, at 4.

111. F. JACOBS, *supra* note 60, at 204. Other examples of derogation clauses in international human rights documents are Art. 4 of the International Covenant on Civil and Political Rights, and Art. 27 of the American Convention on Human Rights. Schreuer, *Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights*, 9 YALE J. WORLD PUB. ORD. 113, 114-15 (1982). Even the United States Constitution has a clause empowering Congress to suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. Common Article Three and Protocol II are not derogable. BOTHE, COMMENTARY, *supra* note 86, at 653. Solf, *supra* note 83, at 927.

112. European Convention, *supra* note 5, art. 15(1).

113. *Id.* art. 15(2). Those provisions are: Art. 2, dealing with right to life "except in respect of deaths resulting from lawful acts of war"; Art. 3, prohibiting torture and inhuman or degrading treatment; Art. 4(1), prohibiting slavery; and Art. 7, dealing with certain criminal offenses and penalties.

114. *Id.* art. 15(3).

tional law.[115]

The European Commission and Court decide whether a "public emergency" within the meaning of Article 15 exists and whether the measures taken were strictly required by the circumstances.[116] They will, however, give some deference to the judgment of the nation concerned, observing that it is "in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it."[117]

From 1957 until 1984, the United Kingdom had notified the Council of Europe of the public emergency in Northern Ireland and of the special powers in derogation from the European Convention.[118] In *Ireland v. United Kingdom*, the European Court, applying its deferential standard of scrutiny, held that the public emergency in fact existed and that the measures taken by the United Kingdom were strictly required by the circumstances.[119]

B. Extraordinary Powers

The United Kingdom has derogated from the European Convention in favor of legislation aimed at maintaining order in Northern Ireland. This section discusses the effect of these powers on three crucial areas of criminal procedure: (1) arrest, detention and seizure; (2) right to jury trial; and (3) admissibility of confessions.

1. Arrest, Detention, and Seizure

Soon after the creation of Northern Ireland, the new parliament assumed emergency powers under the 1922 Act.[120] This Act was enabling

115. F. JACOBS, *supra* note 60, at 204.

116. Lawless v. Ireland (No. 3), 3 Eur. Ct. H.R. (ser. A) 27 (1960).

117. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978). For a discussion of the derogation jurisprudence under the European Convention, see Hartman, *supra* note 6, at 23-35.

118. *See generally* note 60 and accompanying text.

119. *Ireland*, 25 Eur. Ct. H.R. (ser. A) ¶32 (1978). The existence of a public emergency was not disputed by the parties. *Id.* ¶ 205. For a criticism of the Court's unanimous finding that the measures taken by the United Kingdom were strictly required by the circumstances, see Hartman, *supra* note 6, at 32-34. The reader may wonder why, since Britain's notice of derogation continued through 1980, Art. 15 was not an issue in the *McFeeley* application. The issue of whether alleged violations of the Convention were justified on Art. 15 grounds has normally been addressed on the merits and usually cannot be disposed of at the level of admissibility. F. JACOBS, *supra* note 60, at 208. Since all the *McFeeley* allegations were reserved or dismissed as inadmissible, the Commission never had occasion to consider whether a "public emergency" still existed in Northern Ireland and whether the prison authorities' tactics exceeded the those permitted by Art. 15.

120. 1922 Act, *supra* note 42.

legislation, which provided the government with the power "to take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order . . . ."[121] The regulations gave security forces almost unlimited power to, *inter alia*, enter and search any premises,[122] stop, search and seize any vehicle[123] or person,[124] arrest without warrant and detain any person for forty-eight hours for interrogation,[125] and detain indefinitely any person without charge or trial.[126] It further provided that anyone acting in a manner "prejudicial" to peace and order could be imprisoned even though his or her action was not specifically proscribed in the regulations.[127] The 1922 Act remained in force until it was finally repealed in 1973.[128]

The 1922 Act's modern successors are the Emergency Provisions Act of 1978[129] and the Prevention of Terrorism Act of 1984.[130] While less draconian than its predecessor, the 1978 Act still retains many of the same features. Section 11 provides that the police may arrest without warrant any person they suspect of being a terrorist, and for that purpose may enter and search any premises.[131] There is no requirement that the suspicion be reasonable, or the arrest be for the purpose of bringing the suspect before a court. The suspect may be detained for up to seventy-two hours[132] and forced to have his photograph and fingerprints taken.[133]

The Secretary of State retains modified powers of internment under Section 12 and Schedule 1 of the 1978 Act.[134] Section 13 provides that

121. *Id.* art. 1(1).
122. *Id.* reg. 4, *reprinted in* Cameron Report, *supra* note 27, at 105-06.
123. 1922 Act, *supra* note 42, reg. 5.
124. *Id.* reg. 6.
125. *Id.* reg. 10.
126. *Id.* reg. 11.
127. *Id.* art. 2(4).
128. The 1922 Act originally was to remain in force for only one year, but "in view of the continued existence of subversive organisations" it was annually re-enacted until 1928, when it was extended for five years. *Id.*, introductory notes. The 1922 Act, despite its "emergency" nature, was made permanent in 1933. The Civil Authorities (Special Powers) Act (Northern Ireland) 1933, 23 & 24 Geo. 5 ch. 12, sched. 2, *reprinted in* 17 HALSBURY'S STATUTES OF ENGLAND 182 (2d ed. 1950). The 1922 Act was repealed by the 1973 Act, *supra* note 44. One author comments that while the origin of the Special Powers Act of 1922 was unremarkable, the fact that it remained in force for 50 years could hardly be justified in an ostensibly democratic state. Lowry, *supra* note 38, at 270.
129. 1978 Act, *supra* note 3.
130. 1984 Act, *supra* note 4.
131. 1978 Act, *supra* note 3, § 11(1)-(2).
132. *Id.* § 11(3).
133. *Id.* § 11(4).
134. *Id.* § 12, sched. 1.

the police may arrest without warrant any person whom they suspect of committing, having committed, or being about to commit any offense under the Act.[135] For this purpose, as in Section 11, the police may enter and search any premises without a warrant and seize anything they suspect of being connected with the offense.[136]

Section 14 grants the British military in Northern Ireland power to arrest without warrant anyone they suspect of committing or about to commit "any offence" and detain them for not more than four hours.[137] For the purpose of arresting someone under this section, the military may enter and search any premises.[138] The military may also enter any premises "other than a dwelling-house" to search for munitions or transmitters,[139] and enter any premises whatsoever whenever "necessary to do so in the course of operations."[140] Upon order by or on behalf of the Secretary of State, the military may take possession of any property, place it in a "state of defence," detain, move or destroy it, or "do any other act interfering with any public right or with any private rights of property."[141]

The 1984 Act is a continuation of the original Prevention of Terrorism Act of 1974, when extraordinary powers of arrest and detention were introduced in Great Britain in the wake of an IRA bombing campaign in Birmingham.[142] This Act enables the Secretary of State to exclude from any part of the United Kingdom "persons concerned in terrorism designed to influence public opinion or Government policy with respect to affairs in Northern Ireland."[143] Under Section 12, a British constable may arrest without warrant anyone he or she reasonably suspects is a terrorist or is subject to an exclusion order.[144] A person so arrested may be held for 48 hours, or up to five days if specified by the Secretary of State.[145] Section 13 grants the Secretary of State broad powers for the search and arrest of suspected terrorists entering or leaving Northern Ireland.[146]

Many of the above provisions contravene Articles 5 and 6 of the

135. *Id.* § 13(1).
136. *Id.* §§ 13(2)-13(3).
137. *Id.* § 14(1).
138. *Id.* § 14(3).
139. *Id.* § 15.
140. *Id.* § 19(1).
141. *Id.* § 19(2).
142. P. HILLYARD, *supra* note 52, at 42.
143. 1984 Act, *supra* note 4, preliminary note.
144. *Id.* § 12.
145. *Id.* § 12(4)-(5).
146. *Id.* § 13.

European Convention. Article 5(1)(c) requires that an arrest be made upon *reasonable* suspicion of an offense being committed and for the purpose of bringing the offender before a competent court. Neither Sections 11, 13, nor 14 of the 1978 Act contain either requirement, nor does Section 12 of the 1984 Act require arrest for the purpose of bringing the offender to court.[147] In addition, Section 14 of the 1978 Act violates Article 5(2), which requires that an arrestee be given a reason for the arrest.[148] Section 12 and Schedule 1, although unused since 1975, contravene almost every one of the provisions of Articles 5 and 6,[149] particularly the guarantees to a fair and public hearing before an impartial tribunal.[150]

2. The Right to Jury Trial

In 1972, a special commission chaired by Lord Diplock reviewed procedures in Northern Irish Courts for convicting those suspected of terrorist activity.[151] Concern over IRA intimidation of witnesses and jurors, as well as the difficulty of selecting an unbiased jury from Ulster's highly-polarized community, led the Commission to recommend abolition of trial by jury.[152] The British government accepted the Diplock Commission's findings and immediately incorporated them into the 1973 Emergency Provisions Act.[153] Courts utilizing these new procedures are called "Diplock courts."

Section 7 of the 1978 Act provides that trial of "scheduled offences" will be held before a Diplock court without a jury.[154] Section 7 also provides that when an indictment contains both scheduled and non-scheduled offenses, the Diplock court will hear all charges.[155] The scheduled offenses include murder, riot, kidnapping, illegal use of explosives and firearms, prison escape, and hijacking.[156] The Attorney General for Northern Ireland has the power to certify in a particular case that certain crimes, such as murder, manslaughter, and assault occasioning actual

147. *See* Baker Report, *supra* note 3, ¶¶ 264, 340.

148. *Id.* ¶ 264.

149. *See supra* note 134 and accompanying text.

150. *See* European Convention, *supra* note 5, art. 6(1).

151. Diplock Report, *supra* note 7.

152. *Id.* ¶¶ 35-41.

153. 1973 Act, *supra* note 44; TEN YEARS ON, *supra* note 3, at 38; Lowry, *supra* note 38, at 296.

154. 1978 Act, *supra* note 3, § 7(1).

155. *Id.* § 7(3).

156. *Id.* sched. 4. The list of scheduled offenses is quite long and contains over 48 different crimes.

bodily harm, should not be treated as scheduled offenses.[157]

3. Admissibility of Confessions

The Diplock Commission's report also contained recommendations to relax the common law rules governing admissibility of confessions.[158] This recommendation was incorporated into the 1973 Emergency Provisions Act and carried through into the 1978 Act. Under Section 8 of the 1978 Act, a confession elicited from a criminal suspect will be admitted into evidence unless the accused was subjected to "torture or to inhuman or degrading treatment."[159] This language was borrowed from Article 3 of the European Convention,[160] which has been held by the European Court not to include "occasional rough treatment or slaps about the head."[161] In *R. v. McCormick*, a Northern Irish court held that this interpretation of Section 8 was persuasive and concluded that the interrogator could legally use moderate degrees of physical mistreatment to induce a confession.[162]

Section 8 severely undermines the English common law doctrine of voluntariness, which prohibits the admission of confessions obtained by inducement or coercion.[163] A confession given involuntarily would be admissible in a Diplock court unless the tactics used to obtain the confession rose to the level of torture or inhuman treatment.[164]

The Section 8 standard has worked hand in hand with British interrogation practices to procure confessions from suspected terrorists. In *Ireland v. United Kingdom*, the European Court held Britain in violation of Article 3 of the European Convention for using certain torturous interrogation techniques on suspects during the internment period.[165] Although Britain pledged to abandon use of those particular techniques,

157. *Id.*

158. Diplock Report, *supra* note 7, ¶¶ 73-92.

159. 1978 Act, *supra* note 3, § 8(2).

160. Art. 3 states that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention, *supra* note 5, art. 3.

161. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 32.

162. 1977 N. Ir. 105, 111, *discussed in* Baker Report, *supra* note 3, at ¶ 192.

163. 11 HALSBURY'S LAWS OF ENGLAND § 410 (4th ed. 1976). The Diplock Report decried the "voluntariness" doctrine as developed by the British and Northern Irish courts as "detailed technical rules and practice" which were "hampering the course of justice in the case of terrorist crimes." Diplock Report, *supra* note 7, § 87.

164. *See* 11 HALSBURY'S LAWS OF ENGLAND § 414 (4th ed. 1976) for examples of confessions ruled "inadmissible as having been induced by (1) fear, threats or pressure by a person in authority, (2) promises of favour or advantage by such a person, or (3) a combination of such threats and promises." *Id.* § 414. Any of these confessions would have been admissible under the Section 8 standard.

165. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 32 (1978). The security forces

pressure remained on the police in Northern Ireland to secure convictions of suspected terrorists following the abandonment of internment in 1975. Complaints of psychological and physical mistreatment in newly-constructed interrogation centers continued.[166]

In 1979, Britain empanelled the Bennett Committee to investigate these allegations. The Committee confirmed that ill-treatment of suspects had occurred.[167] The Bennett report contained a number of recommendations to improve supervision of interrogation and eliminate future abuses.[168] These recommendations were adopted by the British government.[169]

Studies have shown that the Diplock courts indeed rely heavily on confessions admitted under section 8 to secure convictions. During 1976 and 1977, seventy to ninety percent of the convictions obtained under the 1978 Act were based wholly or primarily on confessions made to the police and admitted under section 8.[170] A study of 240 cases in 1979 showed that fifty-seven percent were based solely on a confession offered against the defendant, and twenty-nine percent more were based on a confession along with some other evidence which was usually insufficient to justify a conviction on its own.[171] In three-quarters of these cases in which the defendant contested all charges but was convicted on all or most of them, the prosecutor relied heavily on an alleged confession.[172] The admissibility and reliability of a confession were the only disputed legal issues in most of these trials.[173]

4. British Security Policy

British special powers have been on the books for over sixty consecutive years, despite their supposedly "emergency" nature. Sixteen semi-annual reviews of the Emergency Provisions Acts by the British Parliament have resulted in only one significant change: the power of intern-

used five sensory deprivation techniques during interrogation: "hooding," subjection to white noise, sleep deprivation, continuous wall standing, and deprivation of food and water.

166. TEN YEARS ON, *supra* note 3, at 39. One center was built at Castlereagh and the other at Gough.

167. REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, 1979 Cmnd. Ser. 5, No. 7497 (His Honor H.G. Bennett, Chairman).

168. *Id.*

169. TEN YEARS ON, *supra* note 3, at 39.

170. Foley, *Public Security and Individual Freedom: The Dilemma of Northern Ireland,* 8 YALE J. WORLD PUB. ORD. 284, 299 (1982).

171. TEN YEARS ON, *supra* note 3, at 44.

172. *Id.* at 76-77.

173. *Id.* at 86.

ment, unused since 1975, can now be invoked only by Parliament.[174]

The special powers acts have received criticism from even United Kingdom authorities. In 1969, a group under the Ulster Attorney General concluded that the 1922 Act was "demonstrably despotic, and much of it meaningless or unenforceable or both."[175] At the time of the enactment of the 1978 Act, then Secretary of State William Whitelaw admitted that it contained "some features unpalatable to a democratic society. Her Majesty's government does not disguise the fact that it imposes serious limitations on the traditional liberty of the subject."[176]

United Kingdom security policy in Northern Ireland has gone through two phases since the eruption of the civil rights movement. From 1971 to 1975, Northern Irish and British authorities emphasized detention without trial and use of the military to apply security policy.[177] Internment was applied ineffectively, and in fact exacerbated the security problem.[178] The power of internment has not been used since 1975 and all internees have been released.[179]

Since 1975, British security policy has shifted to favor both criminal prosecution of suspected terrorists in Diplock courts and an enhanced role in arrest and investigation for the RUC.[180] The various provisions of the 1978 and 1984 acts interact to allow security forces in Northern Ireland enormous powers. They may theoretically break into the home

174. Foley, *supra* note 170, at 292.

175. LSTIT, *supra* note 31, at 199.

176. *Id.* at 294.

177. Boyle, *Human Rights and Political Resolution in Northern Ireland*, 9 YALE J. WORLD PUB. ORD. 156, 164 (1982). Due to the extraordinary level of violence in 1971, Northern Irish authorities determined that it was necessary to strike at suspected terrorists against whom sufficient evidence could not be marshalled for an ordinary trial. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 36 (1978). By the end of 1971, 1576 people had been arrested and held under the 1922 Act, of whom 934 were subsequently released. LSTIT, *supra* note 31, at 269-70. Those who were not released remained in special facilities and were not charged with any offense or permitted to go to trial. Lowry, *Ill-Treatment, Brutality and Torture: Some Thoughts Upon the "Treatment" of Irish Political Prisoners*, 22 DE PAUL L. REV. 553, 559 (1973).

178. LSTIT, *supra* note 31, at 269-70. There is evidence that the internment power was applied in a haphazard and provocative fashion. Security forces had trouble identifying IRA members, including the Provisional IRA's command structure. Targets for internment were thus picked in a less than reliable fashion. Many of those seized were merely IRA "sympathizers" or politicians who could cause trouble in the wake of internment. *Id.* at 261-64. Internment in fact backfired. Far from giving Stormont the upper hand on the security situation, it sparked unprecedented waves of violence. "[Authorities were] appalled by the intensity of Catholic reaction [to internment]. They had foreseen rioting, but not warfare . . . . " *Id.* at 269. Internment may indeed have played into the IRA's hands by driving moderate Catholics away from the middle ground and toward the IRA. *Id.* at 270.

179. *Id.* at 165; TEN YEARS ON, *supra* note 3, at 24.

180. *See* Baker Report, *supra* note 3, ¶¶ 33-34.

of a suspected terrorist and arrest him without a warrant, even though the suspicion was unreasonable and the arrest was connected with no particular offense. The suspect could be detained for up to seventy-two hours and subjected to any manner of interrogation short of torture or degrading treatment, knowing that any confession thus obtained would not be thrown out of court. Upon procuring a confession, they could bring him before a judge sitting without a jury, who could then convict him on the basis of that confession alone.

In almost all cases of detention in Northern Ireland the security forces have relied on their broader powers under the Emergency Acts in preference to their normal power to arrest for specific criminal offenses.[181] Moreover, statistics on emergency arrest and subsequent charges suggest that security forces abused their powers by detaining those whom they could not reasonably suspect had committed an offense. From September 1977 to August 1978, 2814 persons were arrested under the then-current Emergency Provisions Act. Of those, only a third were charged with specific offenses.[182] Over 3867 people were arrested in the first ten months of 1980, and of those less than ten percent were eventually prosecuted.[183] This compares with an eighty to ninety percent average in Britain.[184] In effect, the emergency acts authorized massive "trawling operations" by which security forces swept up numerous individuals guilty of no offense, but who they thought might be involved in or have information about terrorist activity.[185]

The Section 8 standard has allowed security forces to rely less on gathering independent evidence of the suspected terrorists' crime and more on procuring confessions as the primary tool of evidence gathering.[186] Correspondingly, Diplock courts are called upon less to evaluate independent evidence of the accused's guilt or innocence than to rule on the admissibility of confessions, which are often deemed dispositive of the defendant's guilt.[187]

181. TEN YEARS ON, *supra* note 3, at 29.

182. *Id.* at 30.

183. Foley, *supra* note 170, at 294-95.

184. *Id.*

185. *See* TEN YEARS ON, *supra* note 3, at 30.

186. Foley, *supra* note 170, at 299; TEN YEARS ON, *supra* note 3, at 38. The Diplock Commission knew that many confessions obtained during prolonged interrogation were being rejected in court, which compelled the Commission to lower the standard for the admission of confessions to support interrogation practices. Diplock Report, *supra* note 7, ¶ 83.

187. TEN YEARS ON, *supra* note 3, at 86.

C. The Baker Report

In 1984, the British government commissioned Sir George Baker to review and comment on the operation of the 1978 and 1984 Acts in Northern Ireland. The Baker Report argued for the reform, but not the repeal, of those acts.

1. Arrest, Detention, and Seizure

The Baker Report took differing views of the power of internment and other special powers of arrest, search, and seizure. With respect to internment, unused since 1975, Baker noted certain arguments in favor of its retention: 1) the situation in Northern Ireland could deteriorate again and the power would then be needed;[188] 2) repeal would demonstrate lack of resolve to deal with outrageous killings;[189] 3) if the power were again needed, the element of surprise would be lost due to the time and publicity needed to reobtain parliamentary approval;[190] and 4) internment had been counter-productive only because it had been badly and indiscriminately used.[191]

Baker rejected these arguments, noting that the retained powers of internment were an "international embarrassment."[192] In response to arguments for retention, he found that: if chaos returned to Northern Ireland, there would be little hope for selective or discriminate internment;[193] human rights groups regard the internment power as "anathema to the rule of law;"[194] internment is inconsistent with the emphasis on police investigation and the policy of criminalization;[195] and internment provides fuel for Republican propaganda.[196] Accordingly, the Baker Report recommended the repeal of the internment power.[197]

The Baker Report, however, recommended against the repeal of the other powers of arrest, detention, and seizure contained in the 1978 and 1984 Acts. Citing the difficulty in obtaining evidence against suspected terrorists through normal procedures,[198] it concluded that the desire to arrest and punish perpetrators of "dreadful crimes" was incompatible

188. Baker Report, *supra* note 3, ¶ 231.
189. *Id.* ¶ 232.
190. *Id.*
191. *Id.*
192. *Id.* ¶ 230.
193. *Id.* ¶ 233.
194. *Id.* ¶ 235.
195. *Id.*
196. *Id.* ¶ 236.
197. *Id.*
198. *Id.* ¶¶ 255-256.

with the desire to cut back on special powers.[199]

The Baker Report instead urged for a number of smaller-scale reforms designed to curb potential abuse. It recommended first that the time in which a suspected terrorist could be arrested and detained under Section 11 of the 1978 Act be reduced from seventy-two to forty-eight hours.[200] The Report also recommended that Sections 11, 13, and 14 of the 1978 Act be amended to require "reasonable suspicion," an objective standard, where they now require merely "suspicion," a subjective standard.[201] Finally, Baker noted confusion over the mulitiplicity of arrest powers available to security forces. He thus recommended that Sections 11 and 13 of the 1978 Act and Section 12 of the 1984 Act be synthesized into one arrest power for Northern Ireland.[202]

The Baker Report's recommendation to repeal the power of internment should be applauded because detention without trial is abhorrent to the values of a western democratic legal system. The Report, however, did not go far enough in critically analyzing the other arrest powers. Throughout the Report, Baker placed the burden of proof on those who advocate change. Baker stated that:

> I have become increasingly more convinced that any provision of the [1978 Act] which may save even one life or bring even one guilty terrorist to conviction and sentence should be retained until the paramilitary forces foreswear terrorism unless there is a powerful convincing reason for repeal or amendment.[203]

Under this rationale, the British government would be justified in implementing increasingly Orwellian security measures until the IRA lays down its arms. For example, placing audiovisual monitors in every Catholic home in Northern Ireland would serve the stated objective. Such a measure, however, would strike an improper balance between security and liberty in a democratic society.

In addition, Baker dismissed without serious consideration the argument that the IRA has been sustained by "an over-emphasis on security policy at the expense of politics," which has contributed to Catholic alienation.[204] Finally, Baker's proposed reforms do nothing to change the fact that special powers arrests may be used for surveillance and har-

199. *Id.* ¶ 254.
200. *Id.* ¶¶ 270-279.
201. *Id.* ¶¶ 283, 346.
202. *Id.* ¶ 304.
203. *Id.* ¶ 18.
204. *Id.* ¶ 256 (quoting Irish Prime Minister Garret FitzGerald in The Times (London), Dec. 23, 1983).

assment. He proposed only that the RUC "be told" to arrest only after checking and double-checking reasonable suspicion that the person has been involved with terrorists' acts.[205]

2. Jury Trial

a. *Return to Jury Trial*

The Baker Report completely rejected any change in the current system of trial of scheduled offenses without a jury. Baker noted that jury intimidation and sectarian verdicts originally motivated Lord Diplock to recommend abolition of trial by jury.[206] Baker then cited certain opinions that the threat of juror intimidation was even greater in 1984 than in 1973.[207] He also observed that the right to trial by jury in criminal cases has been eroded in portions of the former Commonwealth,[208] and juries have almost disappeared in civil cases in England and Wales.[209] The Baker Report thus recommended that trial without jury be retained.[210]

Baker's analysis is unsatisfactory for several reasons. First, he acknowledges the hallowed position of jury trial in criminal cases in English jurisprudence[211] and cites Gardiner's observation that "trial by jury is the best form of trial for serious cases and . . . should be restored in Northern Ireland as soon as this becomes possible."[212] Despite these acknowledgments, Baker again improperly placed the burden on those who advocate jury trials to show that juries would not be intimidated.[213] In-

205. *Id.* ¶¶ 289-292. By the RUC's own figures, between 76% and 90% of those arrested under the special powers acts are released without charge. *Id.* ¶¶ 276, 289.

206. *Id.* ¶¶ 97-100.

207. *Id.* ¶ 107.

208. *Id.* ¶ 104.

209. *Id.* ¶ 106.

210. *Id.* ¶ 108.

211. Baker cites Lord Devlin in L. DEVLIN, TRIAL BY JURY (1970), who said: "[O]f all the institutions that have been created by English law, there is none other that has a better claim to be called . . . the privilege of the Common People of the United Kingdom. . . .it is one which no other European people enjoys." Baker Report, *supra* note 3, ¶ 104.

212. *Id.* ¶ 102. Diplock's observation comports with the English tradition of trying cases at common law before a jury, particularly serious crimes. In his treatise on the English court system, Hanbury notes:

> [I]n cases coming before the courts of Common Law, and more especially in criminal trials before itinerant justices, [trial by jury] became more than a bulwark against injustice . . . . [S]ince the inception of the jury system, it has been widely agreed that *before any person is convicted of a serious crime it is a valuable safeguard to liberty that twelve ordinary citizens, rather than just one professional judge, should be satisfied of his guilt* [emphasis added].

H. HANBURY & D. YARDLEY, ENGLISH COURTS OF LAW (5th ed. 1979).

213. Baker Report, *supra* note 3, ¶ 102.

stead, the burden should have been on Baker to show why Britain should retain a judicial system abhorrent to common law jurisprudence.

Second, merely because the right to jury trial in criminal cases is disappearing in other parts of the world does not mean that it should disappear in a common law democracy, or that a non-jury system is more just. Third, Baker found that terrorists are tried by juries in France and Italy, which take extraordinary precautions for the jury's safety.[214] The Report fails to analyze how the system works in those countries or whether the same procedures could be copied in Northern Ireland.

Fourth, Baker noted a suggestion that juries be imported from England to try scheduled cases. The Report dismissed this suggestion as impractical, without a discussion of its merits.[215] The Report also failed to consider whether suspected terrorists in Northern Ireland could be extradited to England for trial by jury.

Fifth, Baker dismissed without adequate discussion certain arguments in favor of a right to jury trial: intimidation of jurors was never proved; judge trial twists the process in the prosecution's favor; trial without jury breeds lack of confidence in the judiciary; non-jury trials place extra burdens on judges; and the return of juries would emphasize the responsibility of the citizen in the administration of justice.[216] Baker concluded with the rhetorical question, "Would there be juries in any trials if [the IRA] came to power?"[217] as if the IRA's supposed lack of respect for jury trials justified a similar attitude by the British.

b. *Composition of the Court*

The Baker Committee also heard proposals for changing the composition of the court to minimize the possibility of abuse if juries could not be reinstated. The proposals seriously considered were for three-judge courts and trial by a judge with lay assessors or Resident Magistrates (RMs). It was suggested that reform would relieve concerns about trial by judge alone and provide an additional safeguard against unjust decisions.[218]

Baker first considered the record of three-judge courts for criminal cases in India and the Republic of Ireland. In 1919, India created a three-judge court to try offenses connected with anarchical or revolutionary movements. Baker inexplicably admitted that he had no information

214. *Id.* ¶ 106.
215. *Id.* ¶ 108.
216. *Id.*
217. *Id.*
218. *Id.* ¶¶ 110, 112.

on the success of these courts and was unable to discover whether they encountered "any procedural difficulties anticipated or real."[219]

Since 1939, Ireland has empanelled special courts to try scheduled offenses under the Offences Against the State Act of 1939, which normally consist of a High Court judge presiding over two judges from the circuit court and district court.[220] Baker cited a report which praised the Irish special courts for discharging the difficult dual function of ruling on the admissibility of confessions and the weight to attach to them. This report concluded that the special courts had operated well when presided over by a High Court judge and when adequately covered by the press. It made no mention of any of the procedural difficulties feared by Diplock and Gardiner.[221]

Despite his seeming lack of care in gathering relevant information and despite the record of the Irish special courts, Baker dismissed the notion of a three-judge court on administrative and procedural grounds. The Report cited *inter alia* the backlog of non-jury cases in Northern Ireland,[222] a shortage of trained judges,[223] and trivial concerns over whether three separate judgments would issue, and how and by whom teams would be picked.[224]

The Baker Report also rejected the notion of a court with two lay assessors or RMs assisting the judge. Baker again cited certain minor procedural concerns,[225] as well as the more substantial concern that lay assessors, like jurors, would be subject to threats and intimidation.[226] In rejecting the idea of having two RMs serve on the Diplock courts, the Report cited the RMs' lack of criminal trial experience and opposition to the idea from the RMs and judges themselves.[227]

The Baker Report's rejection of a modified court structure is unsatisfactory because it fails adequately to assess the history of three-judge criminal trials in other nations and ignores the praiseworthy record of such courts in the Republic of Ireland. Although Baker conceded that

219. *Id.* ¶ 114(a).

220. *Id.* ¶ 114(b).

221. *Id.*

222. *Id.*

223. *Id.* ¶¶ 115-118.

224. *Id.* ¶ 119.

225. *Id.* ¶ 127. For example, Baker was concerned with whether the judge would sum up or read his notes to the lay assessors or write a judgment, and whether the judge should record a dissent.

226. *Id.*

227. *Id.* ¶ 128.

administrative and procedural difficulties could be overcome,[228] he again held firm to the status quo by placing the burden of proof on the "reformers."[229] Baker ultimately was persuaded by bald assertions that modified courts for trial of scheduled offenses would be a "recipe for disaster" and "would tend to destroy public confidence in the judiciary."[230]

c. *Descheduling Offenses*

In order at least partially to facilitate desires to return to trial by jury in Northern Ireland, the Baker Report recommended that the Attorney General and the Director of Public Prosecutions be granted new and greater powers to "deschedule" and "certify out" scheduled offenses.[231] In this context "deschedule" means removing an entire offense from the list of scheduled offenses in the 1978 Act, and "certify out" means certifying that an individual case is not to be treated as a scheduled offense.[232] Under this plan, these officials would be in a better position to ensure that extraordinary judicial procedures which deny a defendant the right to jury trial are not applied to non-terrorists.[233]

3. Admissibility of Confessions

Baker felt that Diplock court judges had applied Section 8 with "good sense," and recommended retaining it with certain modifications.[234] First, he observed that Section 8 as interpreted by *Ireland v. United Kingdom* and *R. v. McCormick* left room for interrogation methods "usually condemned in the civilized world."[235] Baker accordingly recommended that it be redrafted to specifically exclude violence.[236] Furthermore, Baker recommended that Section 8 be modified explicitly to include the judge's common-law discretion to exclude an otherwise admissible confession.[237]

With its Section 8 analysis the Baker Report again struck a balance between security and liberty, which weighed heavily toward the former. Baker decried the common law voluntariness standard as "detailed tech-

228. *Id.* ¶ 119.
229. *Id.* ¶ 121.
230. *Id.* ¶ 119.
231. *Id.* ¶¶ 130-150.
232. *Id.* ¶ 131.
233. *Id.* ¶ 130.
234. *Id.* ¶ 188.
235. *Id.* ¶¶ 189-192.
236. *Id.* ¶ 200.
237. *Id.* ¶¶ 194-200.

nical rules and practice" which enabled "the guilty" to be acquitted.[238] The Report also cast aspersions on "[t]he so-called right to silence, which some . . . still regard as a luxury that any civilized society faced with increasing violent crime can ill afford . . . ."[239] Under this reasoning, Britain may never restore common-law safeguards against admission of coerced confessions.

D. The Withdrawal of Derogation

In 1984, the British government reviewed its notice of derogation to the Council of Europe under Article 15, in light of the need for and operation of the emergency legislation in force. On August 22, 1984, Britain announced that:

> [T]he government is satisfied that the measures currently taken to deal with the terrorist threat in the United Kingdom are fully in accord with both the [International Covenant on Civil and Political Rights] and the [European Convention] and that it would be right now to withdraw the United Kingdom's notices of derogation from these instruments.[240]

Britain supported its decision by noting that some emergency provisions were no longer in force, in particular detention without trial.[241] While maintaining that the 1978 and 1984 Acts were still necessary to deal with the situation in Northern Ireland, Britain concluded that these emergency powers are consistent with the European Convention.[242]

Britain's withdrawal of its notice of derogation under Article 15 is suspect for a number of reasons. First, the power of detention without trial, while dormant since 1975, remains in the 1978 Act and may be resurrected at anytime.[243] Second, the Baker Report itself acknowledged that Sections 11, 12, 13, and 14 of the 1978 Act and Section 12 of the 1984 Act violate Article 5 of the Convention.[244]

Under *Lawless* and *Ireland v. United Kingdom*, the European Commission and Court have the power to determine whether a state's invocation of Article 15 was justified.[245] It is unclear whether the Commission

238. *Id.* ¶ 189.
239. *Id.*
240. BRITISH INFORMATION SERVICES, NORTHERN IRELAND, HUMAN RIGHTS 2 (Aug. 22, 1984).
241. *Id.*
242. *Id.*
243. *See supra* note 134.
244. Baker Report, *supra* note 3, ¶¶ 230, 264, 340.
245. *See supra* notes 115-17 and accompanying text.

and Court also have the power to determine whether a state's *withdrawal* of derogation under Article 15 is justified. As a result, a future litigant before the Commission who was arrested under the offending special powers could now argue that such arrest violated Article 5 because Britain has disavailed itself of the Article 15 defense.

VI. CONCLUSION

Northern Ireland's Republican and Loyalist communities are sharply divided by social, cultural, economic, and political differences. Certain members of those communities felt compelled to adopt unlawful or violent tactics in support of their political goals. Members of paramilitary organizations such as the IRA, who claim political motivation for their crimes, however, derive no special status as prisoners under existing United Kingdom and international law.

The international community should recognize, however, that those imprisoned through special powers in derogation from or in violation of international human rights guarantees are special prisoners, regardless of the individual's motivation. Security forces in Northern Ireland have enjoyed "emergency" police powers for over sixty years, powers which flaunt guarantees set forth in the European Convention on Human Rights and Britain's own common-law safeguards for the criminal suspect. To call IRA prisoners "ordinary" criminals masks the fact that Britain operates a split judicial system in Northern Ireland. Those subject to the special system should be special prisoners.

Britain's experience with terrorism in Northern Ireland contains two lessons for other western democracies. First, denial of special status for IRA prisoners was one aspect of a larger campaign to recast the conflict in Northern Ireland in security and not political terms. Other nations should be wary of adopting a legal response to terrorism which emphasizes bringing terrorists to justice at any expense, without addressing the fundamentally political problems which allow terrorism to flourish. Second, Britain has tried to strike a legal balance between security and liberty in Northern Ireland in the battle against terrorism, which arguably tips too far in favor of the former. Other democracies should not strike a similarily skewed balance at the expense of cherished human rights guarantees.